STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDER AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation,

Plaintiff/Appellant,

-vs-

KATHLEEN M. WILBUR, Director of the Michigan Department of Consumer & Industry Services and NORMAN W. DONKER, Midland County Prosecuting Attorney,

Defendants/Appellees,

and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,

Intervenor/Defendant/Appellee,

and

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MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Michigan Corporation, MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, a Michigan Corporation, and MICHIGAN CHAPTER OF THE SHEET METAL AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, a Michigan Corporation,

Intervenors/Defendants/Appellees,

and

MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney,

Intervenor/Appellee.

Lower Docket Case No. 00-2512-CL-L

Court of Appeals Docket No. 234037

Intervenors/Defendants/Appellees' Brief In Opposition to Leave to Appeal

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DAVID JOHN MASUD (P37291)
KRAIG M. SCHUTTER (P45339)
MASUD, GILBERT & PATTERSON, P.C.
Attorneys for Plaintiff/Appellant
4449 Fashion Square Boulevard
Saginaw, MI 48603
(517) 792-4499

RICHARD P. GARTNER (P27119)
ROBERT C. WARD, JR. (P21979
Assistant Attorneys General
Attorneys for Defendant/Appellee Wilbur
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

GARY L. LIEBER (*pro hac vice*)
ANESSA ABRAMS (*pro hac vice*)
KATHERINE K. BREWER
SCHMELTZER, APTAKER & SHEPARD, P.C.
Attorneys for Intervenors/Defendants/Appellees
Michigan NECA, Michigan MCA, and
Michigan SMACNA
2600 Virginia Avenue, N.W., Suite 1000
Washington, D.C. 20037
(202) 333-8800

JOHN R. CANZANO (P30417)
KLIMIST, McKNIGHT, SALE,
McCLOW & CANZANO, P.C.
Attorneys for Intervenor/Defendant/Appellee
Michigan State Building & Construction
Trades Council (MSBCTC) and
Local Counsel for Intervenors/Defendants/Appellees
Michigan NECA, Michigan MCA, and
Michigan SMACNA
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650

LAWRENCE WM. SMITH (P27029)
GILBERT, SMITH & BORRELLO, P.C.
Attorneys for Defendant/Appellant Donker
721 South Michigan Avenue
Saginaw, MI 48602
(517) 792-2500

DAVID M. GILBERT (P31230)
GILBERT, SMITH & BORRELLO, P.C.
Attorneys for Intervenor/Appellee
Michael D. Thomas
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

ANDRE R. BORRELLO (P48651)
GILBERT, SMITH & BORRELLO, P.C.
Co-Counsel for Intervenor/Defendant/Appellee
Michigan State Building & Construction Trades
Council (MSBCTC)
721 South Michigan Avenue
Saginaw, MI 48602
(989) 790-2500

INTERVENORS/DEFENDANTS/APPELLEES' BRIEF IN OPPOSITION TO LEAVE TO APPEAL

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1. **Was the Court of Appeals Correct in Concluding That this Case Does Not Involve an Actual Controversy Within the Meaning of MCR 2.605(A)?**

   APPELLEES SAY: YES

   APPELLANT SAYS: NO

   THE COURT OF APPEALS SAYS: YES

2. **Does the Inclusion of *Dicta* By the Court of Appeals Make Its Decision One That Is "Clearly Erroneous and Will Cause Material Injustice" Warranting Discretionary Review by the Supreme Court under MCR 7.302(b)(5)?**

   APPELLEES SAY: NO

   APPELLANT SAYS: YES

   THIS QUESTION WAS NOT BEFORE THE COURT OF APPEALS

I. INTRODUCTION

On August 5, 2003, a unanimous panel of the Court of Appeals (Chief Judge Whitbeck and Judges Donofrio and White) issued a well-reasoned 15-page unpublished opinion (hereinafter "*Opinion*") holding that Plaintiff[1] had failed to establish an "actual controversy" in its lawsuit seeking a declaratory judgment that Michigan's 38-year old Prevailing Wage Act, 1965 PA 166, MCL 408.551 *et seq.* ("PWA")[2] was unconstitutionally vague and an unconstitutional delegation of legislative authority. As the Court stated at the outset of its Opinion:

> On the present record, we conclude there is no actual controversy. We conclude that because the injuries plaintiff seeks to present are at this point merely hypothetical, this Court may not proceed to reach the question of the PWA's constitutionality.

Opinion at 2. Plaintiff filed a motion for reconsideration on about August 25, 2003. After considering the additional briefs submitted by the parties on the "actual controversy" question, the Court of Appeals denied the motion for reconsideration.

The Court of Appeals properly declined to issue an advisory opinion or rule on the

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[1] This Brief in Opposition is filed jointly by the Intervenor/Defendants/Appellees Michigan Chapter of the National Electrical Contractors Association, Inc., Michigan Mechanical Contractors Association Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association, and the Michigan State Building and Construction Trades Council, referred to jointly herein as "Intervenor Defendants." Plaintiff/Appellant Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC") is referred to herein as "Plaintiff." The other parties are Defendants/Appellees Kathleen Wilbur, sued in her official capacity as then-Director of the Michigan Department of Consumer and Industry Services, Norman Donker, Midland County Prosecuting Attorney, and Intervenor/Appellee Michael Thomas, Saginaw County Prosecutor, who was allowed to intervene as a Defendant in the Court of Appeals.

[2] As the Court of Appeals noted, Michigan's PWA is patterned after the federal *Davis-Bacon Act*, 40 USC 276a *et seq*, enacted in 1931. The public policy underlying the PWA, like the *Davis Bacon Act*, is to "protect employees of government contractors from substandard wages" and "giv[ing] local labor and the local contract or a fair opportunity to participate in this building program." *Western Michigan University v State of Michigan*, 455 Mich 531, 535, 565 NW2d 828 (1997), citing *Universities Research Ass'n Inc v Coutu*, 450 US 754, 773-774, 101 SCt 1451, 67 LEd 2d 662 (1981). *Opinion*, at 2.

constitutionality of the PWA based on Plaintiff's hypotheticals. The wisdom of the Court's decision is readily apparent upon even a cursory review of Plaintiff's 50-page brief in support of its application for leave. ("Plaintiff's Brief") Repeating the approach it has utilized throughout this litigation, Plaintiff has put forward page after page of a scattershot litany of unsupported allegations concerning how the PWA is supposedly confusing and deficient -- none of which it has ever raised with the Michigan Department of Consumer and Industry Services ("CIS"), the agency charged with administering the PWA. Similarly -- although such appeals to legislative wisdom obviously have no place here -- Plaintiff repeatedly and brazenly argues that the PWA (in Plaintiff's opinion) is bad public policy. Plaintiff's not-so-subtle approach is an attempt to convince this Court to do that which the Michigan Legislature has consistently refused to do -- repeal the PWA.

What Plaintiff is missing -- as the Court of Appeals correctly recognized -- is a real, live case involving a concrete and particularized dispute that would enable a court to engage in the judicial function of *deciding an actual case presenting an actual controversy.* Instead, Plaintiff has presented a myriad of speculative complaints which make it impossible for this Court or any court to focus its constitutional analysis on the real facts of a specific case.

It is precisely this danger -- that the courts will usurp the role of the legislature if not limited to deciding real, live particularized and concrete cases -- that the "actual controversy" rule is designed to avoid. As Justice Scalia, writing for the majority, explained in *Lewis v Casey*, 518 US 343, 349, 116 SCt 2174, 135 LEd 2d 606 (1996):

> [T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political

> branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. [Citations omitted.]

Accord, Lee v Macomb County Bd of Comm'rs, 464 Mich 726, 629 NW2d 900 (2001).

On October 20, 2003, Plaintiff filed its Application for Leave to Appeal in this Court, under MCR 7.302(B)(5), contending that "the Opinion of the Court of Appeals is clearly erroneous ... and ... constitutes material injustice." (Plaintiff's Brief at ix).[3] Despite Plaintiff's strenuous efforts to seriously confuse the issue, this case is not about the constitutionality -- or the wisdom -- of the PWA. Rather, this case presents a routine fact question about whether Plaintiff met its burden to establish an actual controversy. As explained herein, the Court of Appeals properly concluded that Plaintiff failed to establish an actual controversy.

Certainly, and in any event, there is no basis to conclude that the Court of Appeals' decision was "clearly erroneous and will cause material injustice" as required by MCR 7.302(B)(5). MCR 7.302(B) "reflect[s] a basic policy of the Supreme Court that energies should be devoted to reviewing important matters and policing the administration of the judicial system, rather than be dissipated in attempts to correct every possibility of error in the decisions of the lower courts. This basic policy can be implemented effectively only through the wise exercise of the Supreme Court's discretion in its determination of which cases will be formally heard by the court." 5 Martin, Dean & Webster, *Michigan Court Rules Practice*, Rule 7.302 at 369.

This case does not present any important issues -- constitutional or otherwise -- which merit this Court's attention. The Court should deny leave to appeal.

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[3] Plaintiff bases its application for leave to appeal exclusively on MCR 7.203(B)(5).

II. SECTION 4 OF THE PREVAILING WAGE ACT

The key provision of the PWA in this case is Section 4, MCL 408.554:

> **408.554. Commissioner to establish prevailing wages; hearing**
>
> Sec. 4. The commissioner shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employees. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization. If the prevailing rates of wages and fringe benefits cannot reasonably and fairly be applied in any locality because no such agreements or understandings exist, the commissioner shall determine the rates and fringe benefits for the same or most similar employment in the nearest and most similar neighboring locality in which such agreements or understandings do exist. The commissioner may hold public hearings in the locality in which the work is to be performed to determine the prevailing wage and fringe benefit rates. All prevailing wage and fringe benefit rates determined under this section shall be filed in the office of the commissioner of labor and made available to the public.

Thus, "the Commissioner," i.e., the Department of Consumer and Industry Services ("CIS") must review the wage and fringe benefit rates found in local collective bargaining agreements and understandings. *See, Michigan State Bldg & Constr Trades Council v Perry*, 241 Mich App 406, 616 NW2d 697 (2000). CIS must then establish each applicable prevailing wage and fringe benefit rate "at *the same rate that prevails* on projects of similar character in the locality *under collective agreements* or *understandings* ..." In other words, if there are multiple rates under applicable agreements or understandings, including the "two-tier" wage scales or "market recovery" rates about which Plaintiff complains, CIS must determine the **single** *rate that prevails* -- i.e., the rate that is paid the majority of the time for a given type of work in a given locality. In short, so long as CIS

does what the statute requires it to do, its published prevailing wage rates will accurately reflect the negotiated market rates actually prevailing under collective bargaining agreements or understandings between unions and employers. Whether CIS does what the statute requires is simply a matter of proper or improper administration, and has nothing to do with the constitutionality of the statute itself.

III. ARGUMENT

A. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD AND RIGHTLY CONCLUDED THAT THERE IS NO ACTUAL CONTROVERSY SUPPORTING A DECLARATORY JUDGMENT IN THIS CASE.

(1) MCR 2.605(A) Requires the Existence of An Actual, Not Hypothetical, Controversy Before a Declaratory Judgment May Be Rendered.

MCR 2.605(A) empowers the courts to issue declaratory judgments only where an actual controversy exists.[4] Where no case of actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment. *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117, 121, 380 NW2d 71 (1985). "[T]he plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 739, 629 NW2d 900 (2001), *citing Lujan v Defenders of Wildlife*, 504 US 555, 560- 561, 112

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[4] The pertinent section of Rule 2.605 states:

> (A) Power to Enter Declaratory Judgments.
>
> > (1) In *a case of actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted. (emphasis supplied)

SCt 2130, 119 LEd 2d 351 (1992). In short, an actual controversy does not exist where the injury sought to be prevented is merely hypothetical. *See, e.g., Lee, supra; See also, Chrysler Corp v The Home Ins Co*, 213 Mich App 610, 613, 540 NW2d 485 (1995); *Fieger v Comm'r of Insurance*, 174 Mich App 467, 471, 437 NW2d 271 (1983). The difference between an abstract question and an actual case or controversy is necessarily one of degree and must be determined after a review of the facts presented in each case. *United Food and Commercial Workers International Union, AFL-CIO, CLC v IBP, Inc*, 857 F2d 422, 426 (CA8 1988), citing *Babbitt v United Farm Workers National Union*, 442 US 289, 297, 99 SCt 2301, 60 LEd 2d 895 (1979).

(2) The Court of Appeals Applied the Correct Legal Standard.

In order to deflect attention from what the Court of Appeals correctly perceived as Plaintiff's complete failure to establish an actual controversy in this case, Plaintiff erects a straw man and sets about knocking it down. Specifically, Plaintiff asserts that the Court of Appeals erroneously held that only "actual or threatened prosecution" under the PWA is sufficient to satisfy the "actual controversy" requirement for obtaining declaratory relief under MCR 2.605. Plaintiff interprets this standard as requiring confirmation or notice of an actual criminal prosecution. *See* Plaintiff's Brief at 7-8. The lower court did not, however, confine itself to so narrow a rule. In any event, Plaintiff has not established the existence of an actual controversy under any formulation of that requirement.

The Court of Appeals demonstrably knew and applied the correct standard for determining the existence of an actual controversy. The Court of Appeals held that there is no actual controversy because "the injuries plaintiff seeks to prevent at this point are merely hypothetical," not because there was no actual threat of criminal prosecution. *See Opinion*, at 2. At page 7 of the Opinion, quoting *Citizens for Common Sense in Government v Atty General*, 243 Mich App 43, 55, 620

NW2d 546 (2000), the Court stated:

> A case of actual controversy generally does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss.

At pages 7 and 8, quoting *BCBSM v Governor*, 422 Mich 1, 92-93, 367 NW2d 1 (1985) the Court stated:

> [S]tatutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand. . . .
>
> * * *
>
> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented. . . ." [Quoting *United States v Raines*, 362 US 17, 22; 80 S Ct 519; 4 L Ed 2d 524 (1960).]

At page 8, the Court stated:

> Plaintiff maintains that the documentary evidence it submitted below established the existence of an actual controversy and that is was not simply presenting hypotheticals. We disagree.

Reviewing certain documentary evidence submitted by Plaintiff regarding a misclassification of lawn sprinkler installers, the Court at page 8 found this evidence insufficient to establish an actual controversy:

> However, plaintiff presented no evidence that any further action occurred - - no evidence of a pending threatened prosecution or actual prosecution, and no evidence of a contract termination - - and plaintiff filed the instant complaint in 2000, almost a decade after the alleged sprinkler company incident.

Similarly, after reviewing a CBA containing a market recovery program which Plaintiff had submitted, the Court concluded at page 11 that this evidence did not establish an actual controversy, explaining that:

> [P]laintiff submitted no evidence linking the CBA or the addendum it alleges went undisclosed to the CIS to **any** actual loss, injury, **or** threatened or actual prosecution under the PWA. (emphasis supplied)

Finally, at page 14, the court concluded:

> We conclude that the plaintiff did not establish that there was actual or imminently threatened prosecution of any of its members, nor has plaintiff shown that a declaratory judgment or decree is necessary to guide its future conduct in order to preserve its legal rights with respect to any particular contract or bid. Absent an actual controversy, the circuit court lacked subject matter jurisdiction to enter a declaratory judgment [citation omitted], and this Court lacks jurisdiction and thus may not consider plaintiff's constitutional challenges.

The Court of Appeals paid particular attention to imminent threat of prosecution because *that is the ground on which Plaintiff itself sought to establish an actual controversy.* Plaintiff's evidence before the Court of Appeals involved: (1) the referral of PWA charges against a Kalamazoo lawn sprinkler company to the prosecuting attorney in 1991; (2) the referral of PWA charge against Gary Tenaglia and General Electric Contracting, Inc., to the prosecuting attorney for violating the PWA in 1999; and (3) CIS' suggestion to claimants that they might consider pursuing their PWA claims criminally against Lee Goulet and Midland Painting Company in 1999. *Opinion,* at 8-10. If there were any doubt that Plaintiff relied on the threat of criminal prosecution to establish actual controversy in the Court of Appeals, it is dispelled by Plaintiff's own statement in its Brief to this Court. Plaintiff states:

> "Clearly, declaratory judgment is an appropriate form of relief in this case because ABC members who perform work subject to the PWA face a real threat of criminal prosecution and, thus, have presented an 'actual controversy' to the lower court under MCR 2.605."

Plaintiff's Brief at 7. The Court of Appeals simply concluded, correctly, that stale evidence

regarding possible but unrealized criminal prosecution does not establish an actual controversy.[5]

(3) The Court of Appeals Correctly Concluded That This Cases Raises No Actual Controversy.

(a) Contractors' Alleged Fear About Future Violations of the PWA Does Not Establish an Actual Controversy.

Relying on *Strager v Wayne County Prosecuting Attorney*, 10 Mich App 166, 159 NW2d 175 (1968), *Kalamazoo Police Supervisors' Ass'n v City of Kalamazoo*, 130 Mich App 513, 343 NW2d 601 (1983), and *United Food and Commercial Workers International Union v IBP, Inc.*, 857 F2d 422 (CA8 1988), Plaintiff contends that this case meets the case or controversy requirement because: (1) "ABC members ... are required to abide by the PWA" (Plaintiff's Brief at 10); (2) "ABC members perform (or desire to perform) work on state funded construction projects and that the business conduct of ABC members is therefore regulated by the PWA" (Plaintiff's Brief at 15); (3) "ABC members ... continue to maintain a reasonable and justifiable fear of criminal prosecution should they violate any of the provisions of the PWA" (Plaintiff's Brief at 15); and (4) "ABC members believe the state law at issue is unconstitutional" (Plaintiff's Brief at 10). All Plaintiff is really saying is that its members perform work on public works projects subject to the PWA and fear criminal liability if they violate it. At best, this is merely a restatement of Plaintiff's generalized attack on the PWA for being difficult to understand, and is completely devoid of any concrete

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[5] Once the reader pushes through Plaintiff's rhetoric, what emerges is that the Court of Appeals simply applied the correct legal standard to find that no actual controversy exists. Accordingly, Plaintiff has not demonstrated grounds for leave to appeal under MCR 7.302. In seeking leave, Plaintiff relies exclusively on MCR 7.302(B)(5), contending that the decision is "clearly erroneous ... and ... constitutes material injustice." (See Plaintiff's Brief at ix). As explained herein, however, the Court of Appeals' decision is not clearly erroneous. Furthermore, Plaintiff completely fails to demonstrate that the Court's of Appeals' decision that there is no actual controversy in this case will result in "material injustice."

controversy. None of the cases on which Plaintiff relies suggests that these allegations are sufficient to establish an actual controversy.

Plaintiff contends that *Strager* stands for the proposition that the mere fact that the PWA contains criminal penalties that "would" be enforced against its members for violations of the statute satisfies the "actual controversy" requirement. Plaintiff's Brief at 8. *Strager* says no such thing. In *Strager*, the plaintiff builder received a letter from the prosecutor informing him that an informal complaint had been received that the plaintiff was in violation of the Home Improvement Finance Act (HFCA). The letter requested that the plaintiff appear at the prosecutor's office on February 16, 1966, and bring with him certain records. The letter went on to say, "A warrant will be asked for your arrest if you fail to answer this notice." 10 Mich App at 168, 172. The HFCA requires that home improvement installment contracts and loan documents contain certain clauses and prohibits gifts for procuring home improvement contracts or cash loans from the contractor to the buyer. The plaintiff filed a complaint for a declaratory judgment *in which he admitted that he had been in violation of these requirements since the statute was passed.* 10 Mich App at 168-69.

The court addressed two issues: (1) whether or not the declaratory judgment procedure is available to attack a criminal statute; and (2) whether the plaintiff's action was premature because no prosecution against him had been commenced. 10 Mich App at 169.

The first issue concerned the courts' historical reluctance to grant declaratory relief regarding a statute with criminal penalties. The Court of Appeals observed in *Strager* that a number of Michigan cases had granted declaratory relief with respect to "legislation regulating business practices and providing criminal penalties for violation" without discussing the court's power to render a declaratory judgment on a criminal statute. The Court of Appeals concluded:

> While the question of the court's power to grant declaratory relief was neither argued nor discussed in any of the cases cited in the preceding paragraph, we conclude that in Michigan, as in other jurisdictions, a plaintiff may obtain declaratory relief concerning a statute regulating his business practices even though the statute provides a criminal sanction for its violation.

10 Mich App at 170-71. Contrary to ABC's argument, *Strager* did *not* hold that an actual controversy exists merely because a statute exists and may affect the plaintiff's business. That part of the court's decision did not concern whether an actual controversy existed at all. It merely announced the general rule that the declaratory judgment remedy is not necessarily precluded even when a criminal statute is at issue if the statute affects business conduct. The significance of the "business conduct" requirement is that it distinguishes *Strager* from cases involving *individual* conduct. Under *Strager*, where the request for a declaratory judgment concerns a statute with criminal penalties, the "business conduct" requirement must be met before the issue of actual controversy is even reached.

The second issue before the court in *Strager* -- whether or not the case was premature -- concerned the actual controversy requirement. The attorney general argued that the threat of criminal prosecution was not sufficiently imminent to justify the declaratory judgment action. The Court of Appeals disagreed, pointing out that the prosecuting attorney had threatened in writing to issue a warrant for the plaintiff's arrest and that the plaintiff "may justifiably assume public officials will do their duty." 10 Mich App at 172. Contrary to ABC's argument, the court in *Strager* did not rely on the abstract belief that public officials will do their duty to create an actual controversy, but on the imminent harm created by the prosecutor's explicit threat to arrest the plaintiff for failing to comply with an investigation which, as the plaintiff admitted, could only reveal past and continuing

statutory violations. Plaintiff does not allege in this case that any of is members are in similar jeopardy.

Regarding the *Kalamazoo* case, Plaintiff makes a great deal of the fact that the court there found an actual controversy even though no prosecution was threatened. However, in *Kalamazoo*, unlike here, an actual controversy was established by the existence of an "hours of work" schedule in a collective bargaining agreement that, on its face, arguably violated the Fire Department Hours of Labor Act. The union wanted the contract enforced, but the employer was unwilling to do so without a declaration that the questioned provision did not violate the Hours of Labor Act. Thus, the parties were faced with the impossible choice of risking liability under a Michigan statute or breaching a contractual obligation. Understandably, the Court of Appeals held that this established an actual controversy and that the parties to the labor contract did not first have to be arrested in order to obtain guidance as to whether or not the contract ran afoul of the statute.

Contrary to Plaintiff's contention, the Court of Appeals did not conclude in *Kalamazoo*, based on *Strager*, that an actual controversy exists whenever the statute simply "affects the trade or business" of the interested parties. Rather, the Court relied on *Strager* for the proposition that a declaratory judgment proceeding is proper to test the validity of *a criminal statute* when this standard is met. 130 Mich App at 517. The court analyzed whether or not an actual controversy existed under a different standard. Specifically, the court stated that, "One test of the right to institute [declaratory judgment] proceedings is the necessity of present adjudication as a guide for interested parties in order to preserve their legal rights." 130 Mich App at 518. The Court concluded that an actual controversy existed in that case because this was "precisely why the parties seek declaratory relief; they seek guidance from the Court as to whether their proposed hours of work schedule would run

afoul of the act." *Id.*

Unlike *Kalamazoo*, this case does not involve a Hobson's choice between breaching a contract, on the one hand, and facing criminal liability on the other. Plaintiff points to no present contractual or legal obligation of its members that, on its face, arguably violates the PWA. Unlike in *Strager* and *Kalamazoo*, there is no claim and no evidence here that anyone has violated the PWA. In fact, just the opposite is true. In the two affidavits relied on by Plaintiff to establish an "actual controversy," the affiants *admit* that they have at all times "complied with the mandates of the law where applicable." (Tenaglia Affidavit, ¶10, and Goulet Affidavit, ¶8, Exs. F & G to Plaintiff's Brief). This critical distinction precludes Plaintiff from establishing an actual controversy here.

UFCW likewise fails to support ABC's argument. In *UFCW*, union members were restrained in their ability to engage in otherwise lawful picketing by the Nebraska "mass picketing" law, which limits the number and spacing of pickets to two pickets within 50 feet of any entrance and prohibits persistently communicating with a person for the purpose of inducing him or her not to work. In 1982, union members who were picketing in support of their collective bargaining demands were arrested and charged with violating the "mass picketing" law. During the 1986 contract negotiations, the same union struck after the bargaining unit employees were locked out. The Dakota County attorney said he would relax enforcement of the mass picketing law but set his own limits on the picketing in conjunction with the state police. Out of fear of arrest, the pickets complied. In April 1987, another union attempted to engage in area standards picketing. One week after picketing began, the union discontinued the action because picketing within the restrictions of the mass picketing law was ineffective. A union official testified that the union would resume the area standards picketing were it not for the numbers/distance restriction in the mass picketing law. 857

F2d at 424-25.

In concluding that the union had standing to sue and had raised a justiciable controversy, the court stated:

> In this case, the county attorney indicated clearly to the United Food and Commercial Workers Union his authority to enforce the picketing laws and acted throughout the union's strike against IBP to curtail the union's activities. Union official William Schmitz testified that but for the existence of the Nebraska picketing statutes and the county attorney's statements regarding enforcement, the union would have had more people picketing, would have had more people stationed at the entrances to the plant, and would have held more demonstrations. Schmitz limited picketing activities and organized picketers in accordance with the county attorney's directions to avoid "problems," which the county attorney had warned would trigger enforcement of the statutes. Union members had reason to fear arrest based upon past experience: members had been arrested and prosecuted for violation of the numbers /distance provision in 1982.

857 F2d at 427 (emphasis supplied).

The court went on to say that past arrests or threat of arrest were not necessary to establish the justiciability of the union's claim, but not, as Plaintiff contends, because mere fear of future prosecution is sufficient. Rather, the court did not rely on past arrests *for the specific reason that the union's conduct implicated constitutional rights*. The court stated: "Where plaintiffs allege an intention to engage in a course of conduct *arguably affected with a constitutional interest which is clearly proscribed by statute*, courts have found standing to challenge the statute, even absent a specific threat of enforcement." 857 F2d at 427-28 (emphasis supplied). At stake in *UFCW* was not the hypothetical fear of prosecution for some undefined future act, but the clear and continuing restraint created by the mass picketing law on the union's ability to engage in constitutionally protected First Amendment conduct integral to its functions as a union. As the court stated, the

union members "will very likely picket again, and when they do, they desire to engage in conduct violative of both [statutory] provisions, yet arguably protected by the constitution.... Under these circumstances, we find that plaintiffs are not simply attempting to obtain an advisory opinion or to enlist the court in a general effort to purge the Nebraska statute books of unconstitutional legislation." 857 F2d at 430.[6]

Plaintiff here has neither claimed nor proven *any* actual or imminent injury that is even remotely similar to the harm which established an actual controversy in *UFCW*.

(b) The Court of Appeals Correctly Relied on Applicable Principles of Constitutional Analysis That Support and Elucidate the Actual Controversy Requirement.

Contrary to Plaintiff's contention, *BCBSM v Governor*, 422 Mich 1, 367 NW2d 1 (1985), is on point, fully supports the Court of Appeals' decision and does not demonstrate the court's "lack of any grasp whatsoever of the legal standards at issue." Plaintiff's Brief at 18. The Court of Appeals cited *BCBSM* to emphasize the importance of an actual controversy where, as here, the statute is attacked for being unconstitutionally vague. On this issue, the Supreme Court stated as follows:

> It is a general principle of constitutional law that statutory language

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[6] Plaintiff contends that the defendants in this case have the burden of proving that the PWA will never be enforced in order to eliminate any actual controversy. This is incorrect. There is no need for the defendants to try to prove that the PWA is "moribund" because Plaintiff has not even established that there is a conflict between the PWA and the legal rights of its members. As stated in *Caribbean Int'l News Corp v Agostini*, 12 F Supp 2d 206, 212-23 (DPR 1998), the case Plaintiff cites for this contention, "*Where the circumstances indicate that a plaintiff will either be in violation of a statute which limits its normal conduct or be forced to engage in self-censorship*, a pre-enforcement challenge is appropriate unless the state demonstrates that the statute is moribund or will not be enforced." *Caribbean Int'l* involved infringement upon First Amendment rights. Plaintiff does not contend that its members' First Amendment rights are at stake, nor does it allege that the normal conduct of its members have forced them or will force them to violate the PWA.

must be sufficiently clear and definite to provide fair warning of proscribed conduct. [citation omitted] However, as this Court noted in *People v Howell*, 396 Mich 16, 21; 238 NW2d 148 (1976), statutes which do not involve First Amendment rights must be examined in light of the facts of the case at hand. The *Howell* Court cited *United States v National Dairy Products Corp*, 372 US 29, 32; 83 SCt 594; 9 LEd 2d 561 (1963), which further elucidates the problem associated with insubstantial vagueness challenges:

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases .... [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were ... presented. We might add that this rule frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretation of statutes in areas where their constitutional application may be cloudy." [citation omitted]."

The present statute has not yet brought the BCBSM and the Insurance Commissioner into an actual adversarial relationship over the statutory terms. BCBSM is not yet defending its definition against a conflicting position asserted by the Insurance Commission. BCBSM hypothesizes areas of possible future confrontation, but on the present record we do not have an actual controversy to justify a constitutional analysis.

422 Mich at 93-94, *cited in Opinion* at 7-8. It is difficult to imagine a statement that better points out the infirmities of Plaintiff's case here. Just like plaintiff in *BCBSM*, Plaintiff here seeks to invalidate the PWA on the basis of hypothetical areas of future confrontation.[7] It desires to sweep

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[7] Plaintiff tries to escape the obvious similarities between this case and *BCBSM* by alleging that there is an actual adversarial relationship between the CIS and Plaintiff because Plaintiff disagrees with the way the CIS has administered the PWA over the years -- *even though Plaintiff has never seen fit to address those concerns to CIS.* Clearly, disagreeing in general with the way a statute is enforced is not the "adversarial relationship" the Supreme Court had in mind in *BCBSM*. ABC also contends that *BCBSM* is distinguishable because it did not involve a statute with criminal penalties. This is not a valid basis for distinguishing *BCBSM* because the plaintiff here based its (continued...)

away the entire statute without alleging a single concrete controversy that will serve to sharpen the issues and allow this Court to focus on the particular statutory provision at issue and determine whether or not an unavoidable constitutional conflict exists.[8]

(c) Plaintiff's Evidence of Past Criminal Complaints Against Its Members Does Not Establish an Actual Controversy.

The only evidence Plaintiff proffers to this Court regarding actual events, as opposed to subjective fears, are contained in the Affidavits of Gary Tenaglia (Plaintiff's Brief Ex. F) and Lee Goulet (Plaintiff's Brief Ex. G). *See* Plaintiff's Brief at 15-16. Both of these Affidavits focus on potential criminal prosecution, but each falls well short of establishing an actual controversy, as the Court of Appeals properly recognized.

Tenaglia asserts that he had been "subject to criminal investigation and threatened with criminal prosecution by the Macomb Prosecutor's office for alleged violations of Michigan's Prevailing Wage Act." Tenaglia Aff. ¶11. Specifically, Tenaglia asserts with respect to the "criminal investigation" that the CIS referred twenty-seven PWA complaints against him to the county prosecutor in 1999, that the county prosecutor referred the complaints back to the CIS at Tenaglia's request, that the prosecutor informed Tenaglia that he retained jurisdiction without regard

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[7](...continued)
vagueness attack on the constitutional right not to be deprived of liberty or property without due process, the same right that governs criminal statutes. *See* 422 Mich at 92.

[8] ABC points out that the Supreme Court concluded in *BCBSM* that one provision regarding review of actuarial decisions determining risk factors for each line of business was an unconstitutional delegation of legislative power. ABC contends that the Court of Appeals' failure to mention this demonstrates its ignorance of the issues in this case. In reaching this conclusion, the Supreme Court relied on the "complete lack of standards" defining the Insurance Commissioners and the actuaries' decisions. 422 Mich at 53-55. This holding has no application to the facts alleged here.

to CIS' determination, and that the CIS re-investigated the complaints and concluded that there was no basis for proceeding on any of them. Tenaglia Aff. ¶¶12-17. With respect to the "threatened criminal prosecution," Tenaglia asserts that, notwithstanding the result of the re-investigation, "the Macomb County Prosecutor's office continues to fail or refuse to dismiss the criminal investigation of General Electric Contracting, Inc., and myself." Tenaglia Aff. ¶20.

Nowhere in the Affidavit is there any indication that there is, in fact, an ongoing criminal investigation or that the county prosecutor has threatened any criminal action against Tenaglia or his company. Nor does Plaintiff explain how or by what legal authority a prosecutor could "dismiss" a criminal investigation.[9] Tenaglia also asserts that he "remains apprehensive" about bidding and working on prevailing wage projects and has altered his work practices due to the "administrative burdens and uncertainty" as to how the CIS establishes prevailing wage rates. Tenaglia Aff. ¶9. Tenaglia's Affidavit contains no concrete examples, however, of the manner in which Tenaglia has allegedly altered his work practices due to uncertainty about the PWA.

Like Tenaglia, Goulet complains of a worker's complaint against him for violating the PWA. Goulet asserts that he was cited in 1998 by the CIS for misclassifying workers who applied a sealant known as "Dryvit" as painters rather than laborers. Goulet Aff. ¶¶19-20. Goulet asserts that, even though it was patently uncertain which classification applied to workers applying Dryvit, the CIS nevertheless concluded its investigation by "advising claimants to pursue their claims criminally

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[9] Indeed, there appears to be no such thing. According to Plaintiff's argument, there would always be an actionable threat of prosecution whenever a complaint -- with or without merit -- is investigated by a prosecutor unless the prosecutor subsequently issues some sort of formal "dismissal" of the investigation. Since no such legal process exists, Plaintiff cannot premise an "actual controversy" on the prosecutor's failure to use the nonexistent procedure.

through the Mackinac County Prosecutor."[10] Goulet Aff. ¶34. The Affidavit contains no indication that claimants ever approached the prosecutor or that any prosecution was ever even considered or initiated. Goulet also asserts that he remains apprehensive about bidding and working on prevailing wage projects and that he has altered his business practices due to the "administrative burdens and uncertainty" imposed by the PWA, but also gives no concrete examples of ways in which he has altered his business practices. Goulet Aff. ¶10.

Neither of these Affidavits contains any evidence that any prosecutor ever notified Tenaglia or Goulet (or their companies) of his/her intention to prosecute them for violating the PWA. Furthermore, neither Affidavit establishes even a tangible possibility of criminal prosecution. Significantly, neither Tenaglia nor Goulet allege, or assert any facts indicating, that they are, or might be, guilty of current unresolved violations of the PWA.[11] Thus, the presumption that the county prosecutor will "do his duty" in the case of a criminal violation is irrelevant.

While Plaintiff apparently hopes that the Court will *infer* from these Affidavits that Tenaglia and Goulet face a tangible threat of criminal prosecution under the PWA as a result of conduct in 1998 and 1999, that inference is devoid of logical or factual support. At best, these Affidavits

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[10] If true, Goulet's claim at most would mean that CIS incorrectly concluded that Goulet violated the PWA, or that CIS was violating its own policies under which CIS does not investigate complaints which are premised on jurisdictional disputes between unions. (See CIS Rule D 9.00(2), cited at Plaintiff's Brief at 31). Aside from the fact that Goulet (or Plaintiff) never challenged the alleged mistakes with CIS, it is black letter law that "[a] valid statute is not rendered unconstitutional on the basis of improper administration." *Council of Organization v Governor*, 455 Mich 557, 570-74, 566 NW2d 208 (1997); *accord, SEMTA v Sec'y of State*, 104 Mich App 390, 408, 304 NW2d 846 (1981).

[11] To the contrary, as noted *supra*, both Goulet and Tenaglia admit in their affidavits that they have "complied with the mandates of the law where applicable."

establish that Tenaglia and Goulet had an unpleasant experience with the CIS some four or five years ago that never ripened into any type of criminal proceeding and that they "fear" that they may be cited again in the future for some other conduct that may result in criminal prosecution. This is patently insufficient to establish an actual controversy.

For example, in *City of Los Angeles v Lyons*, 461 US 95, 103 SCt 1660, 75 LEd 2d 675 (1983), the United States Supreme Court held that the plaintiff's allegation that a Los Angeles police officer had rendered him unconscious during a traffic stop by using an unlawful choke hold in 1976 did not satisfy the case or controversy requirement for his lawsuit in 1977 to enjoin the use of unlawful choke holds by police.[12] Similarly to Plaintiff here, the plaintiff in *Lyons* alleged that he "justifiably fear[ed] that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse." 461 US at 98. In concluding that the plaintiff's past experience with the police did not establish a current case or controversy, the Court stated:

> That Lyons may have been illegally choked by police on October 6, 1976 ... does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him unto unconsciousness without provocation or resistance on his part.
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> In order to establish an actual controversy in this case, Lyons would not only have to allege that he would have another encounter with police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom

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[12] *Lyons*, like all federal "case and controversy" jurisprudence, is based on Article III of the U.S. Constitution. Although Michigan Courts are not subject to the Article III case or controversy requirement, this Court has expressly adopted the federal "case or controversy" requirement premised on Article III, as the governing rule under Michigan law. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 740, 629 NW2d 900 (2001).

> they have an encounter, whether for the purpose of arrest, issuing a citation, or questioning, or (2) that the City ordered or authorized the police to act in that manner.

461 US at 105-06.[13]

This is essentially the case that Plaintiff is trying to make here. Plaintiff seeks to establish an actual controversy by asserting that the CIS has allegedly acted in an unjustified manner in the past, and that the contractors involved now have a reasonable fear that the CIS will act without justification in the future, leading to criminal penalties. In attempting to support this approach, Plaintiff identifies in its Brief several areas in which possible confusion regarding the appropriate job classifications and wage rates might occur. Plaintiff provides no concrete basis for concluding, however, that it will occur. To put it another way, Plaintiff provides no basis for concluding that the CIS will not agree with an ABC member's interpretation of its obligations under the PWA in uncertain circumstances or that a member will be prosecuted for making a good faith choice between equally defensible interpretations.

To the contrary, Plaintiff cites in its own Brief a rule that provides that the CIS will not investigate the appropriateness of a classification used on a state project other than a generic classification, and may make a reasonable assessment only to ensure that the classification assigned

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[13] *See also, e.g., Grocers Co-op Dairy Co v Grand Haven*, 79 F Supp 938 (WD Mich 1948) (dairy's attack on constitutionality of city ordinance that proscribed licensing scheme that required dairy to process milk in a certain way and to be located within 5 miles of the city limits did not create actual controversy because city had taken no position on dairy's license application and justiciable controversy would arise only after city denied license and announced its specific reasons for doing so); *Wills v O'Grady*, 86 Ill App 3d 775, 409 NE2d 17 (1980) (hypothetical application of statute to future conduct did not establish actual controversy); *Cherry v Koch*, 126 App Div 2d 346, 514 NYS 2d 30 (2d Dept. 1987) (prostitute and patron did not allege actual controversy where they had not been arrested, prosecuted or threatened with prosecution; at best, they alleged hypothetical future controversy not ripe for decision).

is "*generally* consistent with work actually performed." Similarly, CIS "will not investigate complaints involving jurisdictional disputes between trade classifications." CIS Rule D9.00(2)(a) and (b), cited in Plaintiff's Brief at 31. This rule is designed to avoid entangling contractors in the technicalities of collectively bargained job classifications. Plaintiff's contention that this rule leaves its members with no help from the CIS if they are prosecuted is disingenuous. Criminal proceedings under the PWA are initiated by a request or recommendation from the CIS. It is neither reasonable nor rational to assume the CIS will request prosecution to require adherence to one collectively bargaining job classification over another when the CIS itself would not require it.

(d) Conclusion

Ultimately, Plaintiff makes no pretense that there is an actual case or controversy in this case under any definition. According to Plaintiff, declaratory relief is appropriate because Plaintiff is seeking to strike down the PWA on constitutional grounds "*before* any of its members ... decide to deliberately disregard the Act's requirements on [prevailing wage] jobs and thereby subject themselves to investigation by the CIS and criminal prosecution by Prosecutor Donker." Plaintiff's Brief at 7 (emphasis in original). Clearly, the possibility that some of Plaintiff's members might deliberately violate the Act at some future date and face liability for doing so does not present an actual case or controversy. Absent concrete circumstances in which an ABC contractor risks violating the PWA, which are not present in this case, this assertion merely states the truism that a contractor who violates a statute with criminal penalties risks criminal prosecution. This contention is tantamount to saying that the mere *existence* of a statute with criminal penalties that governs a certain kind of business activity permits any entity engaged in that business to launch an all-out constitutional attack on that statute "in thin air." This cannot be the proper test. It would write the

actual controversy requirement out of the law and open the door to exactly the kind of speculation -- and judicial legislation -- that the actual controversy requirement is designed to avoid.

B. TO THE EXTENT THE COURT OF APPEALS DECISION INCLUDED *DICTA* REFLECTING ITS OPINION THAT PLAINTIFF'S SUBSTANTIVE CLAIMS WERE WITHOUT MERIT, INCLUSION OF THAT *DICTA* WAS NOT ERROR. CERTAINLY, THE DECISION IS NOT "CLEARLY ERRONEOUS" AND WILL NOT CAUSE "MATERIAL INJUSTICE" AS A RESULT OF SUCH *DICTA*.

Part B (pp. 19-50) of Plaintiff's Brief requires little response. In Part B, Plaintiff has again completely failed to establish any grounds for invoking this Court's discretionary jurisdiction to grant leave to appeal. As noted previously, Plaintiff bases its application exclusively on MCR 7.302(B)(5) contending that "the Opinion of the Court of Appeals is clearly erroneous ... and ... constitutes material injustice." (Plaintiff's Brief at ix, "Statement of Basis for Jurisdiction"). Because Plaintiff does not even attempt to meet -- and does not meet -- that standard in Part B, its application for leave must be denied.

Literally, Plaintiff is asking this Supreme Court to grant leave to appeal because the Court of Appeals included *dicta* in its Opinion. Obviously, an appellate court does not commit error, and certainly not the "clearly erroneous" error required by MCR 7.302(B)(5), merely by including *dicta* in its decision. If that were the case, very many, if not most, appellate decisions would be "clearly erroneous." Intervenor Defendants agree that to the extent the Court of Appeals discussed the substantive merits of the case after finding that it lacked subject matter jurisdiction, those portions of its Opinion are *dicta*. But precisely because it was *dicta*, the court's discussion of the merits was not necessary to the holding of the case and has no precedential value. *See, e.g., People v Borchard-Ruhland*, 460 Mich 278, 286 n 4, 597 NW2d 1 (1999) (*dicta* "lacks the force of an adjudication and

is not binding"); *Dessart v Burak*, 252 Mich App 490, 496, 652 NW2d 669 (2002). In other words, the *dicta* does not matter. Since it does not matter, it cannot be "clearly erroneous," and it cannot cause "material injustice." In short, the *dicta* does not and can not constitute grounds for leave to appeal here. MCR 7.302(B)(5).

Although Plaintiff argues *ad nauseam* that the Court of Appeals' resort to *dicta* was error, and that the *dicta* itself was erroneous, Plaintiff misses the point. To the extent the Court of Appeals substantively analyzed the merits of Plaintiff's vagueness and delegation claims, its analysis was 100% correct. But even if it were not entirely correct, such error cannot be grounds for leave to appeal.

None of the cases which Plaintiff cites even remotely suggest that it was reversible error, let alone "clearly erroneous" for the court to include *dicta* in its decision after concluding it lacked subject matter jurisdiction. See cases cited in Plaintiff's Brief at 20. Once the Court of Appeals concluded -- at the end of its decision -- that it lacked jurisdiction, it dismissed the case, just as Plaintiff says the court was required to do.

Moreover, the Court of Appeals' discussion in this regard was largely aimed at highlighting the lack of an actual controversy in this case. Thus, the court pointed out that not only was *General Electric v New York Dept of Labor*, 936 F2d 1448 (2d Cir 1999), distinguishable on the facts and the law,[14] but more importantly the court there was presented with an actual controversy as compared to the hypothetical case here. *Opinion* at 13-14.

Similarly, in connection with Plaintiff's cross appeal of the circuit court's ruling that the

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[14] Among other distinctions, the court noted that the New York statute was critically different from the Michigan PWA, and therefore not analogous. *Opinion* at 14.

PWA was not unconstitutionally vague, the Court of Appeals noted that Plaintiff had failed to come forward with any "facts of the case at hand" to sustain an "as applied" challenge to the PWA, let alone a facial challenge. The legal analysis of this issue is very similar, if not identical, to the analysis of the "actual controversy" question, as the court explained:

> With respect to plaintiff's cross-appeal, which argues that the PWA is unconstitutionally vague, both on its face and in application, we note that generally, "[t]he party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the ... [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient ...' " *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 SCt 2095; 95 LEd 2d 697 (1987). "Statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *BCBSM*, *supra* at 93, quoting *People v Howell*, 396 Mich 16, 21; 238 NW2d 148 (1976).
>
> > A law that does not reach constitutionality protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications. [16B Am Jur 2d, §920, p 516, citing *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc,* 455 US 489; 102 SCt 1186; 71 LEd 2d 362 (1982).]
>
> In the instant case, because the PWA does not implicate constitutionality protected conduct, plaintiff may bring a facial challenge only if it demonstrates the law is impermissibly vague in all of its applications. Because plaintiff neither argues nor supports that the PWA is impermissibly vague in all of its applications, its facial challenge on vagueness grounds fails.

> Plaintiff's claim that the PWA is unconstitutional "as applied" also fails because plaintiff has not alleged any "facts of the case at hand" which would allow this Court to analyze an "as applied" challenge in anything but a hypothetical context. See *BCBSM*, *supra*.

Opinion, at 14-15.

Plaintiff's argument that the Court of Appeals *dicta* constitutes reversible "clearly erroneous" error warranting discretionary review by the Supreme Court is noting short of frivolous. This argument is simply a transparent and intellectually dishonest attempt to have this Court decide the constitutional issues which the Court of Appeals wisely and correctly declined to decide (and which the trial court for the most part also did not decide).

As the Court of Appeals explained:

> The invariable practice of the courts is not to consider the constitutionality of legislation unless it is imperatively required, essential to the disposition of the case, and unavoidable. Thus, a court will inquire into the constitutionality of a statute only when and to the extent that a case before it requires entry upon that duty, and only the extent that it is essential to the protection of the rights of the parties concerned.

Opinion at 7, *citing People v Higuera*, 244 Mich App 429, 441, 625 NW2d 444 (2001).

It is not "imperatively required," "essential to the disposition of the case" or "unavoidable" that this Court consider the constitutionality of the PWA in this case. To the contrary, those issues were not addressed below, and should not be addressed here. This Court should deny leave to appeal.

IV. CONCLUSION

For the reasons stated herein, this Court should deny leave to appeal.

Respectfully submitted,

SCHMELTZER, APTAKER & SHEPARD, P.C.

By:_____
GARY L. LIEBER (*pro hac vice*)
KATHERINE K. BREWER
Attorneys for Intervenors/Defendants/Appellees Michigan NECA, Michigan MCA, and Michigan SMACNA
2600 Virginia Avenue, N.W., Suite 1000
Washington, D.C. 20037
(202) 333-8800

KLIMIST, McKNIGHT, SALE, McCLOW & CANZANO, P.C.

By:_____
JOHN R. CANZANO (P30417)
Co-Counsel for Intervenor/Defendant/Appellee Michigan State Building & Construction Trades Council (MSBCTC), and

Local Counsel for Intervenors/Defendants/Appellees Michigan NECA, Michigan MCA, and Michigan SMACNA
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650

Dated: November 10, 2003

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